

When Journalists Weaken Democracy or How to Better Communicate the Rule of Law

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Discussing years of controversies between Polish lawyers and the ruling Law and Justice party, the law professor Marcin Matczak concluded: “We won the legal discussions, but we lost the public debate.” Despite manifest violations of the law, Poland’s ruling party did not lose votes in recent parliamentary elections. In Hungary the situation seems to have been even worse. The public debate was not lost, it hardly took place. That’s a problem.

The rule of law can protect itself through laws and institutions, but only to a point. Governments can undermine, weaken and ultimately remove these protections as long as they get away with it in public opinion. Abraham Lincoln noted: “Public sentiment is everything. With it, nothing can fail; against it, nothing can succeed. Whoever moulds public sentiment goes deeper than he who enacts statutes or pronounces judicial decisions.”

Apart from having good legal arguments, it is essential to communicate them well. The European Commission’s rule of law communication from April 2019 acknowledged as much: “Promoting awareness among the general public on the importance of the rule of law in a democracy can also be helpful and communication activities aimed at reaching out to citizens could be supported.” Various organisations made suggestions to increase public awareness of the importance of the rule of law, but they did not cover one of the most important multiplier target groups: journalists. The following four recommendations on effectively communicating on the rule of law should be useful for many actors, including the EU, but the most critical point – on framing – is particularly relevant for journalists. The EU and others who support the rule of law should make special efforts when communicating with media.

1. Do Not Isolate the Rule of Law from Democracy and Human Rights

The EU institutions and the public debate focus too much on the rule of law when discussing current challenges in member states. Many of these challenges relate to democracy and human rights as well. That’s a problem for many reasons. First, it creates the impression that the three elements can be somehow separated, when in fact they rely on each other. There is no democracy without political rights and a functioning rule of law. And a functioning legal system without democracy or human rights may be efficient, but it will have a legitimacy problem.

Focusing mainly on the rule of law may even speak to the idea that the rule of law and democracy could be opposed to each other and that equally legitimate choices can be made in favour of one or the other (more on that wide-spread framing of problems below).

The problems in Hungary, Poland and Romania are not only related to the rule of law but also to democracy. To mention only one point: Hungary's and Poland's public broadcasters have been turned into tax-funded mouthpieces of their respective governments. That is a democracy problem. It is the reason why OSCE election observation mission have considered elections in both countries to be problematic. And it is a problem for communication. The best communication will not reach audiences in member states, which are cut off pluralistic and balanced debates.

2. Call it Justice or Fairness

Of the EU's article 2 TEU trio – democracy, human rights and the rule of law – the rule of law is the most difficult to communicate. It has least public resonance. An analysis of Google Trends shows that many more people search for 'human rights' and 'democracy', as opposed to the 'rule of law'. The 'rule of law' is a highly abstract concept. Most people do not know what it is. It has no emotional resonance. While Rechtsstaat is somewhat known in Germany, L'Etat de droit is hardly known in France and few Poles would be able to say what pa#stwo prawne means. Many people think that it is a specialist subject, only for lawyers to debate and argue about. In contrast, some aspects of the rule of law are easy to explain and much better understood. Judges need to be independent. If one side in a legal conflict can pressure, bribe or appoint 'their' judge, it is unfair. If everybody must abide by the law, except the rich and the powerful, it is unjust. If one party or a President concentrate all the power in their hands, it is not democratic. Power corrupts and absolute power corrupts absolutely.

Communication for a broad audience should tell stories about people: The respected President of the Supreme Court who is fighting for her independence, the judge who has been unfairly assigned to another, far-away court in an overnight decision, or the government staffer who started an underhand smear campaign against a judge. These things are understood. Instead of talking about the rule of law we should talk about specific that relate to fairness, justice or democracy. Obviously, every actor needs to define its communication strategy based on its mandate and objectives.

These are the easier, somewhat more mechanic aspects of effective communication on the rule of law. The more difficult problems result from the way that these problems are framed in most media articles and public discussions.

3. Framing

Words evoke meaning in the human mind. They create frames that represent and simplify reality. Whatever the words we choose, they carry meaning. We cannot escape the logic of framing an issue. Talking about 'climate change' or about 'climate

emergency' evokes different reactions. Whether one is more appropriate than the other is a judgement to be made.

Considering carefully how to frame a problem is therefore essential to effectively communicate it while remaining truthful. As far as the rule of law problems are concerned, a lot has gone wrong, especially among journalists and political scientists, in accurately describing and framing them.

Forget 'Illiberal Democracy'

As argued in more detail elsewhere, one of most popular yet most damaging frames is the notion of 'illiberal democrats' to talk about government that weaken their courts. 'Liberal' means many things to many people. Defenders of the rule of law use it in the sense of checks and balances. But for many people 'liberal' means economically liberal (unpopular on the left) or socially liberal (unpopular on the right). They see an illiberal democrat as good news – somebody who respects the people's verdict while curbing big business influence or standing against gay marriage, whatever the political preference may be.

Weakening courts and attacking judges is not about being liberal (as understood by most people), it is about justice and fairness. It is also about democracy, because opposition politicians must be able to defend their rights in parliament and it must be possible to investigate and bring to trial government abuse. The people voted for a government to run the country and to implement a programme. They did not vote for a government to enrich itself with impunity. Democracy is based on rules and courts uphold them.

It is not People against Institutions

The idea that there is an opposition between democracy and institutions has taken hold of much of the public debate and it helps politicians like Victor Orbán, who projects the image of somebody close to the people and not afraid of robust debate, claiming that he does not believe that institutions can "protect democracy from the people". The political scientist Yascha Mounk (a critique of Orbán) has pitted fundamental rights (such as freedom of expression or assembly), which he considers to be expressions of liberalism, against democracy, which he defines as a "a set of binding electoral institutions that effectively translates popular views into public policy" through "free and fair elections". In other words, he offers an extreme view of opposing democracy to the rule of law.

Mounk's ideas do not add up from a legal perspective: The right to vote and to stand in elections belongs to other political and civil rights, such as free media, freedom of assembly and freedom of association. You cannot have 'free and fair elections' if media are completely biased towards one side or if parties cannot organise themselves. Communists and Nazis held elections, but they missed all the ingredients of a democratic vote.

Mounk's ideas support Orbán's suggestion that there is a gap between democratic institutions and the people. But the people's will does not emerge and express itself spontaneously and without institutions. There is no 'natural' electoral system, there are no 'natural' arrangements of organising elections or dealing with complaints in elections. They are all created by laws and procedures.

The image that Fidesz is close to the people is good political PR but it does not reflect reality. The party has created institutions to shield itself from democratic debate. Many laws were adopted as cardinal laws, meaning they can only be changed by 2/3 majority in parliaments. Fearing public debates, the parties has adopted many laws in extremely short proceedings as private member bills. The party did not put its constitutional overhaul in 2011 to public referendum. It made public TV a mouthpiece of the government, fearing any balanced discussion of its policies. Paradoxically, private TV which has less obligations for editorial balance, offers more balanced reporting in Hungary. This has nothing to do with being close to the people. It has to do with using institutions to avoid public debate.

Forget 'Populism'

Equally damaging is the catchword of populism. While it has a (contested) meaning among political scientists, most journalists use it as a negative term in a vague manner to describe all kinds of phenomena. Most importantly, the term blurs the red line that should primarily interest us in relation to other EU member states. Do their governments cross the lines from democratic principles to authoritarian governance? If they do not, we discuss legitimate policy choices that should not be decried as populism. If they do, there is a democracy problem which should not be banalized as populism.

The Big Re-framing

These points add up to one insight. Until a decade ago, the dominant frame of assessing political regimes was to ascertain whether they were democratic or authoritarian. Russia and other undemocratic regimes have skilfully changed this frame. Public debate is not about democracy vs non-democracy anymore, it is now about progressive-liberal (meaning for its detractors: immoral, untraditional, elitist, internationalist) versus conservative-traditional (portrayed as down to earth, respectful, rooted, honest). That is why Russian propaganda now focuses so intensively on things like LGTB rights or immigration, trying to create a deep division in democracies, while obscuring the more fundamental division between democracy and non-democracy. And, unfortunately, all the easy language about "illiberal democracy" or "democracy versus liberalism" helped this big reframing.

Instead of using that language, journalists and officials should repeat another message: Democracies can accommodate liberal policies as much as conservative ones. Some EU countries provide for same-sex marriage, other do not. There is no obligation in EU law or in the human rights instruments to do so either. Democracy allows to discuss it openly and to advocate for the choice one prefers.

But democracy does need to protect its rules of the game, such as democratic elections, political freedoms and pluralistic media to allow a real debate. These are the non-negotiables and they are legally binding in the EU Treaty and many other international and regional law sources. These obligations do not contain the word 'liberal', they talk about democracy, the rule of law and human rights.

4. Don't Forget the Future

As mentioned, the public debate often suggests that governments that weaken courts only want to give more effect to the electoral choice of a majority and avoid that courts stop them in doing so. Is that not simply being more democratic? It may be actually, if it was part of a general project to enhance the voice of an electoral majority. Indeed, EU member states delineate the roles of courts versus government in different ways. In some countries, top courts can remove members of the government from office. In others, they are empowered to resolve conflicts of competences between the government and other state actors. But in some, the ability of the judiciary to limit the government in any way is limited at best.

But governments that stuff courts with their loyalists are not working on a general project of recalibrating powers that would apply to whoever wins elections. They take control of the judiciary branch as it exists. That is an authoritarian project, not one in favour of democracy. When they lose elections, they will try to stymie the next governments' agenda through courts that they have stuffed and laws they had adopted. In other words, their much touted majoritarianism is a temporary illusion.

The perception of a mighty struggle of a majoritarian (populist, illiberal) school of politics versus checks & balances (liberal) school will collapse overnight once a current opposition party would win against an authoritarian incumbent (difficult, but possible). Suddenly the "illiberal majoritarian" train of thought would become the checks and balances school (liberal after all!), insisting that the new government respect the laws (it had adopted) and the judgements of the courts (it had stuffed). The new governments, the current 'liberals' would insist on having a democratic mandate for change (and should then be labelled populists or illiberal if these labels were taken seriously). A theory and a framing that is turned on its head by a foreseeable event is not solid.

This scenario should be factored into public communication before it occurs. It is important to signal consistently that democratic majorities have leeway and should do what they are elected to do, as long as they do not violate the rules of the game. The Polish Law and Justice party was perfectly entitled to fulfil its mandate of giving more support to families living in Poland. But that policy did not require to make the state media a government mouthpiece and to unlawfully change the composition of the Constitutional Tribunal.

Furthermore, it is worth discussing whether a political system, for example in Hungary, has been disfigured beyond repair, meaning that even if the opposition won elections, it could not reasonably implement any policy in view of hostile state

media, courts stuffed by the majority, a constitution and cardinal laws that put many policies beyond the reach of the normal legislator.

5. It's Not Government against the EU

Governments that get into trouble with the EU over undemocratic reforms enjoy framing the argument as a struggle of the EU against their nation and an insult to its pride brought about by the bogeyman of "Brussels elites" (many of whom are national government officials). Effective communication will avoid that idea. It is never EU versus Romania or EU versus Hungary. The EU gets involved when there is serious concern about domestic reforms undermining the rule of law and democracy. The EU acts when national courts refer cases to the Court of Justice of the European Union, which courts in all member states do.

In the same manner it is not a question of right versus left, as for example Victor Orbán tries to make believe. The EU has taken steps against the left-wing Romanian government over planned judiciary reforms as it did with Poland and Hungary's right-wing parties. Democratic guarantees have nothing to do with migration, George Soros or gender politics. They are about fundamental rights of citizens to freely engage and participate in politics to discuss all these issues free of manipulation and through processes that are transparent and accessible.

6. Conclusion: Avoid a Wavering Trumpet

More effective communication on democracy and the rule of law must be achieved at many levels, from the rules of good communication that apply anywhere to clarity on essential concepts. The conceptual questions may seem academic, but if they have real life consequences in a world where opponents of democracy work with sophisticated PR that will exploit weaknesses in any argument. Operating with fuzzy or counterproductive notions like 'populism' or 'illiberal democracy' sounds like a wavering trumpet at a time when democracy and the rule of law need clarion calls.

